Basic English Contract Law

Modified from:

BASIC PRINCIPLES OF ENGLISH CONTRACT LAW

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Formation of A Contract

- **A contract is an agreement giving rise to obligations which are enforced or recognised by law.**
- **In common law, there are 3 basic essentials to the creation of a contract: (i) agreement; (ii) contractual intention; and (iii) consideration.**
- **The first requisite of a contract is that the parties should have reached agreement. Generally speaking, an agreement is reached when one party makes an offer, which is accepted by another party. In deciding whether the parties have reached agreement, the courts will apply an objective test.**

OFFER

- **An offer is an expression of willingness to contract on specified terms, made with the intention that it is to be binding once accepted by the person to whom it is addressed. There must be an objective manifestation of intent by the offeror to be bound by the offer if accepted by the other party.**
- **Therefore, the offeror will be bound if his words or conduct are such as to induce a reasonable third party observer to believe that he intends to be bound, even if in fact he has no such intention. This was held to be the case where a university made an offer of a place to an intending student as a result of a clerical error.**

Stover v Manchester City Council [1974] 1 WLR 1403

- **D sent P a document titled Agreement for Sale and a letter which stated: If you will sign the Agreement and return it, I will send you the Agreement signed on behalf of the council in exchange P signed and returned the Agreement for Sale Labour party took control of the council and did not return a signed copy, refusing to sell the property P sued for breach of contract.**
- **Was there an agreement?**
- **The court held: There was a binding obligation on D to sell**: Lord Denning: Said, "…i**n contracts you do not look into the actual intent in a man's mind. You look to what he said and did. A contract is formed when there is, to all outward appearances, contract. A man cannot get out of a contract by saying 'I did not intend to contract' if by his words he has done so...objectively … to a reasonable man D's letter appeared to commit to selling the property if P returned the documents."**

- **An offer of a student place was capable of acceptance, but a mandatory injunction was refused. The court gave guidance on how to decide if leave was necessary to make an appeal to the Court of Appeal.**

OFFER

- **An offer can be addressed to a single person, to a specified group of persons, or to the world at large. An example of the latter would be a reward poster for the return of a lost pet.**
- **An offer may be made expressly (by words) or by conduct.**
- **An offer must be distinguished from an invitation to treat, by which a person does not make an offer but invites another party to do so. Whether a statement is an offer or an invitation to treat depends primarily on the intention with which it is made.**

INVITATION TO TREAT

- **An invitation to treat is not made with the intention that it is to be binding as soon as the person to whom it is addressed communicates his assent to its terms.**

INVITATION TO TREAT

- **Common examples of invitations to treat include advertisements or displays of goods on a shelf in a self-service store.**

Partridge v Crittenden (1968) 2 All ER 421

- **The defendant placed an advert in a classified section of a magazine offering some bramble finches for sale. S.6 of the Protection of Birds Act 1954 made it an offence to offer such birds for sale. He was charged and convicted of the offence and appealed against his conviction. The court held: The defendant's conviction was quashed. The advert was an invitation to treat not an offer. The literal rule of statutory interpretation was applied.**

- **Boots introduced the then new self service system into their shops whereby customers would pick up goods from the shelf put them in their basket and then take them to the cash till to pay. The PSGB brought an action to determine the legality of the system with regard to the sale of pharmaceutical products which were required by law to be sold in the presence of a pharmacist.**

Pharmaceutical Society of Great Britain v Boots Cash Chemist (Southern) Ltd [1953] 1 QB 410

- **The court thus needed to determine where the contract came into existence. The court held: Goods on the shelf constitute an invitation to treat not an offer. A customer takes the goods to the till and makes an offer to purchase. The shop assistant then chooses whether to accept the offer. The contract is therefore concluded at the till in the presence of a pharmacist.**

Carlill v Carbolic Smoke Ball Company [1893] 2 QB 256

- **A medical firm advertised that its new drug, a carbolic smoke ball, would cure flu, and if it did not, buyers would receive £100. When sued, Carbolic argued the advert was not to be taken as a legally binding offer; it was merely an invitation to treat, a mere puff or gimmick. However, the Court of Appeal held that the advertisement was an offer. An intention to be bound could be inferred from the statement that the advertisers had deposited £1,000 in their bank "shewing our sincerity".**

ACCEPTANCE

- **An acceptance is a final and unqualified expression of assent to the terms of an offer. Again, there must be an objective manifestation, by the recipient of the offer, of an intention to be bound by its terms. An offer must be accepted in accordance with its precise terms if it is to form an agreement. It must exactly match the offer and ALL terms must be accepted.**
- **An offer may be accepted by conduct (for example, an offer to buy goods can be accepted by sending them to the offeror).**

ACCEPTANCE

- **Acceptance has no legal effect until it is communicated to the offeror (because it could cause hardship to the offeror to be bound without knowing that his offer had been accepted). The general rule is that a postal acceptance takes effect when the letter of acceptance is posted (even if the letter may be lost, delayed or destroyed). However, the postal rule will not apply if it is excluded by the express terms of the offer.**

Henton v Fraser [1892] 2 Ch 27

- **The parties had discussed the sale of properties to the plaintiff. The defendant wrote out an offer to sell and handed it to the buyer, who took it away to consider it. A new buyer turned up and a contract was conclcuded, the defendant writing to the buyer to withdraw the offer. Before that letter was received, the defendant had, through his solicitor written back to accept the first offer. The plaintiff sought specific performance.**

Henton v Fraser [1892] 2 Ch 27

- **Lord Herschell set out the Postal Rule in contract situations: 'Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted.'**

Adams v Lindsell [1818] 1 B & Ald 681

- **The case involved two parties in the sale of wool. On 2 September, the defendants wrote to the plaintiffs offering to sell them certain fleeces of wool and requiring an answer in the course of post. The defendants misdirected the letter so that the plaintiffs did not receive it until 5 September. The plaintiffs posted their acceptance on the same day but it was not received until 9 September.**

Adams v Lindsell [1818] 1 B & Ald 681

- **Meanwhile, on 8 September, the defendants, not having received an answer by 7 September as they had expected, sold the wool to someone else.**
- **The defendants argued that there could not be a binding contract until the answer was actually received, and until then they were free to sell the wool to another buyer.**

Adams v Lindsell [1818] 1 B & Ald 681

- Law J **said that if that was true it would be impossible to complete any contract through the post; if the defendants were not bound by their offer until the answer was received, then the plaintiffs would not be bound until they had received word that the defendants had received their acceptance, and this could go on indefinitely.**

Adams v Lindsell [1818] 1 B & Ald 681

- **Instead it must be considered that the offerors were making the offer to the plaintiffs during every moment that the letter was in the post. Then when the Offeree has placed his acceptance in the post there is a fictional meeting of minds, which concludes the offer and gives effect to the acceptance.**

Adams v Lindsell [1818] 1 B & Ald 681

- The acceptance did not arrive in course of post strictly speaking (all parties understood in course of post to refer to 7 September). But because the delay was the default of the defendant it was taken that the acceptance did arrive in course of post.

Adams v Lindsell [1818] 1 B & Ald 681

- **This case was the first step (precedent setting) towards establishing the postal acceptance rule (mailbox rule). It was not until 1892 in *Henthorn v Fraser* [1892] 2 Ch 27 that the court determined the precise timing of the acceptance, that is the moment the letter of acceptance is posted. (See also *Entores Ltd v Miles Far East Corporation* [1955] 2 QB 327).**

Entorres v Miles Far East [1955] 2 QB 327 Court of Appeal

- **The claimant sent a telex message from England offering to purchase 100 tons of Cathodes from the defendants in Holland. The defendant sent back a telex from Holland to the London office accepting that offer. The question for the court was at what point the contract came into existence. If the acceptance was effective from the time the telex was sent the contract was made in Holland and Dutch law would apply.**

Entorres v Miles Far East [1955] 2 QB 327 Court of Appeal

- If the acceptance took place when the telex was received in London then the contract would be governed by English law. The court held: To amount to an effective acceptance the acceptance needed to be communicated to the offeree. Therefore, the contract was made in England.

Hyde v Wrency [1840] 3 Beav 334

- **The defendant offered to sell a farm to the claimant for £1,000. The claimant in reply offered £950 which the defendant refused. The claimant then sought to accept the original offer of £1,000. The defendant refused to sell to the claimant and the claimant brought an action for specific performance. The court held: There was no contract. Where a counter offer is made this destroys the original offer so that it is no longer open to the offeree to accept.**

ACCEPTANCE

- **An offer which requires acceptance to be communicated in a specified way can generally be accepted only in that way. If acceptance occurs via an instantaneous medium such as email, it will take effect at the time and place of receipt. Note that an offeror cannot stipulate that the offeree's silence amounts to acceptance.**

ACCEPTANCE

- A communication fails to take effect as an acceptance where it attempts to vary the terms of an offer. In such cases it is a counter-offer, which the original offeror can either accept or reject. For example, where the offeror offers to trade on its standard terms and the offeree purports to accept, but on its own standard terms, that represents a counter-offer.

ACCEPTANCE

- Making a counter-offer amounts to a rejection of the original offer which cannot subsequently be restored or accepted (unless the parties agree). It is important to distinguish a counter-offer from a mere request for further information regarding the original offer.

ACCEPTANCE

- **An offer may be revoked at any time before its acceptance, however the revocation must be communicated to the offeree. Although revocation need not be communicated by the offeror personally (it can be made by a reliable third party), if it is not communicated, the revocation is ineffective.**

ACCEPTANCE

- **Once an offer has been accepted, the parties have an agreement. That is the basis for a contract, but is not sufficient in itself to create legal obligations.**

CONSIDERATION

- In common law, a promise is not, as a general rule, binding as a contract unless it is supported by consideration (or it is made as a deed). Consideration is “something of value” which is given for a promise and is required in order to make the promise enforceable as a contract.

CONSIDERATION

- **This is traditionally either some detriment to the promisee (in that he may give value) and/or some benefit to the promisor (in that he may receive value). For example, payment by a buyer is consideration for the seller's promise to deliver goods, and delivery of goods is consideration for the buyer's promise to pay. It follows that an informal gratuitous promise does not amount to a contract.**

Consideration must be sufficient, but need not be adequate

- Although a promise has no contractual force unless some value has been given for it, consideration need not be adequate. Courts do not, in general ask whether adequate value has been given (in the sense of there being any economic equivalence between the value of the consideration given and the value of any goods or services received). This is because they do not normally interfere with the bargain made between the parties. Accordingly, nominal consideration is sufficient.

Consideration must be sufficient, but need not be adequate

- There are a few exceptions, for example, where certain terms of a contract are void either by statute (for example, a tenancy agreement) or where the common law holds the terms to be so unreasonable that they cannot be enforced and/or are varied by the courts.

- **The consideration for a promise must be given in return for the promise.**

Consideration must move from the promisee

- The promisee must provide the consideration. Traditionally, a person to whom a promise was made can enforce it only if he himself provided the consideration for it. He has no such right if the consideration moved from a third party. For example, if A promises B to pay £10,000 to B if C will paint A's house and C does so, B cannot enforce A's promise (unless B had procured or undertaken to procure C to do the work).

Consideration must move from the promisee

- **However, where the conditions of the Contracts (Rights of Third Parties) Act 1999 are met, a third party may be able to enforce rights created in his favour by a contract which he was not a party to, and the courts are also adopting a more flexible position under the common law here.**

Consideration must move from the promisee

- **While consideration must move from the promisee, it need not move to the promisor. First, consideration may be satisfied where the promisee suffers some detriment at the promisor's request but confers no corresponding benefit on the promisor. For example, the promise to give up tenancy of a flat may be adequate consideration even though no direct benefit results to the promisor.**

Consideration must move from the promisee

- Secondly, consideration may move from the promisee without moving to the promisor where the promisee, at the promisor's request, confers a benefit on a third party. In situations where goods are bought with a credit card, the issuer makes a promise to the supplier that s/he will be paid. The supplier provides consideration for this by providing goods to the customer.

Byrne v Van Tienhoven [1880] 5 CPD 344

- **On October 1st Van Tienhoven mailed a proposal to sell 100 boxes of tin plates to Byrne at a fixed price. On October 8th, Van Tienhoven mailed a revocation of offer, however that revocation was not received until the 20th. In the interim, on October 11th, Byrne received the original offer and accepted by telegram and turned around and resold the merchandise to a third party on the 15th. Byrne brought an action for non-performance.**

Byrne v Van Tienhoven [1880] 5 CPD 344

- **The issue in this case, was what was the relation between the postal acceptance rule and revocation of the contract? The court held: Judgment for the plaintiffs.**

Byrne v Van Tienhoven [1880] 5 CPD 344

- **Lindley LJ held that the revocation of the offer was not effective until it had been communicated to Byrne. While the postal rule remains good law for acceptance, he found no support for the premise that revocation of an offer is completed once it has been put in the mail. As a result, the revocation was not communicated to Byrne until the 20th, at which point the contract was already formed and thus the revocation was of no effect. To rule otherwise would have been impractical for the commercial realities existing at the time.**

Byrne v Van Tienhoven [1880] 5 CPD 344

- **Revocation must be communicated to the offeree so that the offeree has knowledge of the revocation.**
- **Mere posting of a revocation is not sufficient communication.**

CONTRACTUAL INTENTION

- **An agreement, even if supported by consideration, is not binding as a contract if it was made without an intention to create legal intentions. That is, the parties must intend their agreement to be legally binding.**
- **In the case of ordinary commercial transactions, there is a presumption that the parties intended to create legal relations. The onus of rebutting this presumption is on the party who asserts that no legal effect was intended, and the onus is a heavy one.**

Edwards v Skyways [1964] 1 WLR 349 Court of Appeal

- **The claimant was an airline pilot working for the defendant. He was to be made redundant. The defendants said that if he withdrew his contributions to the company pension fund, they would pay him the equivalent of company contributions in an *ex gratia* payment. The claimant agreed. The company then went back on their promise relating to the *ex gratia* payment. The court held: The agreement had been made in a business context which raised a strong presumption that the agreement is legally binding. The claimant could therefore enforce the agreement and was entitled to the money.**

CONTRACTUAL INTENTION

- **Many social arrangements do not amount to contracts because they are not intended to be legally binding. Equally, many domestic arrangements, such as between husband and wife, or between parent and child, lack force because the parties did not intend them to have legal consequences. In *Balfour v Balfour* [1919] 2 KB 571, a husband who worked abroad promised to pay an allowance of £30 per month to his wife, who was in England.**

CONTRACTUAL INTENTION

- The wife's attempt to enforce this promise failed: the parties did not intend the arrangement to be legally binding. (Note that in addition, the wife had not provided any consideration.)
- An agreement which is made "subject to a contract" (typically, agreements for the sale of land) or a "letter of comfort" is generally unenforceable. The words normally negate any contractual intention, so that the parties are not bound until formal contracts are exchanged.

FORM

- **The general rule is that contracts can be made informally; most contracts can be formed orally, and in some cases, no oral or written communication at all is needed. Thus, an informal exchange of promises can still be as binding and legally valid as a written contract. There are statutory exceptions to this rule. For example: (i) a lease for more than 3 years must be made by deed: Law of Property Act 19 25, ss 52, 54(2); (ii) most contracts for the sale or disposition of an interest in land must be "made in writing": Law of Property (Miscellaneous Provisions) Act 1989, s 2; (iii) contracts of guarantee are required to be evidenced in writing: Statute of Frauds, s 4.**

CONTENTS OF A CONTRACT

- **The terms of a contract can be divided into express terms and implied terms.**

Express Terms:

- **Express terms are ones that the parties have set out in their agreement. The parties may record their agreement, and hence the terms of their contract, in more than one document.**

CONTENTS OF A CONTRACT

- **Those terms may be incorporated by reference into the contract; (for example, where a contract is made subject to standard terms drawn up by a relevant trading association). Or, a contract may be contained in more than one document even though one does not expressly refer to the other (for example, dealings which take place under a 'master contract' with a separate document being executed every time an individual contract is made).**

CONTENTS OF A CONTRACT

- **Here, the master contract lays out most of the underlying terms on which the parties are dealing, while certain specific terms – like price, times for delivery - are covered in individual contracts for each specific trade. Incorporation without express reference depends on the intention of the parties, determined in accordance with the objective test of agreement.**

CONTENTS OF A CONTRACT

- ***Once the express terms have been identified, there is the question of interpretation. The document setting out the parties' agreement must be interpreted objectively: it is not a question of what one party actually intended or what the other party actually understood to have been intended but of what a reasonable person in the position of the parties would have understood the words to mean.***

CONTENTS OF A CONTRACT

- **The starting point for ascertaining the objective meaning is the words used by the parties. These are interpreted according to their meaning in conventional usage, unless there is something in the background showing that some other meaning would have been conveyed to the reasonable person. Thus, the terms of the contract must be read against the *"factual matrix"*; that is, the body of facts reasonably available to both parties when they entered the contract.**

ICS Ltd v West Bromwich [1998] 1 WLR 896

- A frequently-cited English contract law case which laid down that a contextual approach must be taken to the interpretation of contracts.

ICS Ltd v West Bromwich [1998] 1 WLR 896

- **Lord Hoffmann set out *'five principles'*, stating that a contract should be construed according to: 1) what a reasonable person having all the background knowledge would have understood; 2) where the background includes anything in the 'matrix of fact' that could affect the language's meaning; 3) but excluding prior negotiations, for the policy of reducing litigation; 4) where meaning of words is not to be deduced literally, but contextually; and 5) on the presumption that people do not easily make linguistic mistakes.**

- Investors received negligent advice from their financial advisers, solicitors and building societies, including West Bromwich Building Society ('West Bromwich BS'). They had claims in tort and for breach of statutory duty. The investors had been encouraged by financiers to enter "Home Income Plans", which meant mortgaging their properties to get cash that they would put into equity linked bonds. They lost money when house prices and stocks fell. Under the Financial Services Act 1986 section 54 the Securities and Investments Board started the Investors Compensation Scheme Ltd,[1] where investors could be directly compensated for their losses, and ICS would try recoup the cost by suing the building societies on everyone's behalf. Accordingly, to get the compensation investors signed a contract to assign their claims to ICS. But in section 3(b) of the claim form the assignment excluded 'Any claim (whether sounding in rescission for undue influence or otherwise) that you have or may have against the West Bromwich Building Society', so that investors could still sue on some claims individually. While ICS Ltd was suing, West Bromwich BS argued that 'or otherwise' meant that claims for damages, as well as rescission, had not been assigned. ICS Ltd argued that the clause actually meant that claims for damages had been assigned, because 'or otherwise' referred to rescission based claims other than undue influence, but not damages.

- Evan-Lombes J held that the right to claim rescission had been retained but the right to claim damages had been assigned. Leggatt LJ overturned the High Court, and ICS Ltd appealed.

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ICS Ltd v West Bromwich [1998] 1 WLR 896

- **They lost money when house prices and stocks fell. Under the Financial Services Act 1986 section 54 the Securities and Investments Board started the Investors Compensation Scheme Ltd, where investors could be directly compensated for their losses, and ICS would try recoup the cost by suing the building societies on everyone's behalf.**

ICS Ltd v West Bromwich [1998] 1 WLR 896

- **Accordingly, to get the compensation investors signed a contract to assign their claims to ICS. But in section 3(b) of the claim form the assignment excluded 'Any claim (whether sounding in rescission for undue influence or otherwise) that you have or may have against the West Bromwich Building Society', so that investors could still sue on some claims individually. While ICS Ltd was suing, West Bromwich BS argued that 'or otherwise' meant that claims for damages, as well as rescission, had not been assigned.**

ICS Ltd v West Bromwich [1998] 1 WLR 896

- **ICS Ltd argued that the clause actually meant that claims for damages had been assigned, because 'or otherwise' referred to rescission based claims other than undue influence, but not damages.**
- **Evan-Lombes J held: That the right to claim rescission had been retained but the right to claim damages had been assigned. Leggatt LJ overturned the High Court, and ICS Ltd appealed.**

ICS Ltd v West Bromwich [1998] 1 WLR 896

- **The House of Lords held by a majority that the right to claim rescission was retained by the investors, but the right to claim for damages had indeed been assigned. Construed in its context, the words 'Any claim (whether sounding in rescission for undue influence or otherwise) that you have or may have against the West Bromwich Building Society' in effect had meant 'Any claim sounding in rescission (whether for undue influence or otherwise)'.**

ICS Ltd v West Bromwich [1998] 1 WLR 896

- **It followed that ICS Ltd could sue West Bromwich BS, and other building societies, to vindicate the investors' claims. Lord Lloyd dissented.**

CONTENTS OF A CONTRACT

- **The *"Parol Evidence Rule"* provides that evidence cannot be admitted to add to, vary or contradict a written document. Therefore, where a contract has been put in writing, there is a presumption that the writing was intended to include all the terms of the contract, and neither party can rely on extrinsic evidence of terms alleged to have been agreed which are not contained in the document.**

CONTENTS OF A CONTRACT

- **This presumption is *'rebuttable'*, and extrinsic evidence is admissible, if the written document was not intended to set out all the terms on which the parties had agreed. The Parol Evidence Rule prevents a party from relying on extrinsic evidence only about the contents of a contract (and only express terms), and not about its validity (such as the presence or absence of consideration or contractual intention, or where a contract is invalid for a reason such as incapacity).**

IMPLIED TERMS

- A contract may contain terms which are not expressly stated but which are implied, either because the parties intended this, or by operation of law, or by custom or usage.

Terms implied in fact:

- Terms implied in fact are ones which are not expressly set out in the contract, but which the parties must have intended to include. The courts have adopted two tests governing whether a term may be implied.

IMPLIED TERMS

- The first is the "*officious bystander*" test, where a term is so obvious that its inclusion goes without saying, and had an officious bystander asked the parties at the time of contracting whether the term ought to be included, the parties would have replied "Oh, of course". In other words, if it can be established that both parties regarded the term as obvious and would have accepted it, had it been put to them at the time of contracting, that should suffice to support the implication of the term in fact. The alternative test for implication is that of "business efficacy", where the contract would be '*unworkable*' without the term.

IMPLIED TERMS

- **The “*officious bystander*” is a metaphorical figure of English law a ‘*legal fiction*’, developed by MacKinnon LJ in *Southern Foundries (1926) Ltd v Shirlaw* to assist in determining when a term should be implied in an agreement. While the ‘*officious bystander*’ test is not the overriding formulation in English law today, it provides a useful guide.**

IMPLIED TERMS

- **The test is *'outdated'* to the extent that its suggested implication was a process dependent on what contracting parties would have subjectively intended. The main problem is that people would often disagree, or one side's bargaining power such that they could ignore the intentions of the other party.**
- **The rule *'now'* is that terms are implied to reflect the parties' reasonable expectations as a broader part of the process of an objective, context.**

IMPLIED TERMS

- **The suggested approach is to imagine a *'nosey'*, officious bystander walking past two contracting parties and asking them, whether they would want to put some express term into the agreement. If the parties would instantly reply 'of course' the term is apt for implication.**

IMPLIED TERMS

- In *Southern Foundries (1926) Ltd v Shirlaw* MacKinnon LJ wrote, " For my part, I think that there is a test that may be at least as useful as such generalities. If I may quote from an essay which I wrote some years ago, I then said: "*Prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common *'Oh, of course!'*""
- At least it is true, I think, that, if a term were never implied by a judge unless it could pass that test, he could not be held to be wrong."

The Moorcock (1889) 14 PD 64

- The claimant moored his ship at the defendant's wharf on the river Thames. The river Thames is a tidal river and at times when the tide went out the ship would come into contact with the river bed. The ship became damaged due to uneven surfaces and rocks on the river bed. The claimant sought to claim damages from the defendant and the defendant argued that there was no provision in the contract warranting the condition of the river bed.

The Moorcock (1889) 14 PD 64

- **The court held: The court implied a term in fact, that the river bed would be safe for mooring. The court introduced the business efficacy test – for example: the term must be necessary to give the contract business effect. If the contract makes business sense without the term, the courts will not imply a term.**

Terms implied in law and by statute

- **Terms implied in law are terms imported by operation of law, whether the parties intended to include them or not. For example, in a contract for the sale of goods, it is an implied term that the goods will be of a certain quality and, if sold for a particular purpose, will be fit for that purpose.**

Terms implied in law and by statute

- **For certain contracts the law seeks to impose a standardised set of terms as a form of regulation. Many terms which are implied in law have been put into statutory form. For example, a number of important terms are implied in contracts for the sale of goods by ss 12 to 15 of the Sale of Goods Act 1979.**

Terms implied in law and by statute

- Further significant terms may be implied from the nature of the relationship between the parties - for example, contracts for professional services require the professional to act with reasonable standards of competence, a lawyer must act in his client's best interests and a doctor has a duty of confidentiality to his patients.

Terms implied by custom or usage

- Evidence of custom is admissible to add to, but not to contradict, a written contract. Terms may also be implied by trade usage or locality.

THE END OF A CONTRACT

Expiration:

- **This refers to a contract which comes to an end in accordance with its terms, either because it has a fixed expiry date or because there is a right to terminate contained in the contract (a contractual right to terminate is distinct from a common law right to terminate for breach.)**

THE END OF A CONTRACT

Termination:

Breach:

- **A breach of contract is committed when a party, without lawful excuse, fails or refuses to perform what is due from him under the contract, or performs defectively, or incapacitates himself from performing.**

(a) Failure or refusal to perform - a failure or refusal to perform a contractual promise when performance has fallen due is *prima facie* a breach.

THE END OF A CONTRACT
Termination - Breach

- (b) Defective performance - where a person promises to do one thing but does another, which differs, for example, in time, quantity or quality, this amounts to a breach. The effect of such a breach often differs from those of a complete failure or refusal to perform. Note that where the "defect" in performance is particularly serious, the breach may amount to non-performance rather than defective performance (for example, if a seller promises beans but delivers peas).
- (c) Incapacitating oneself - for example, a seller commits a breach of contract for the sale of a specific thing if he sells it to a third party.

THE END OF A CONTRACT
Termination - Breach

Anticipatory Breach:

- **An anticipatory breach occurs when, before performance is due, a party either repudiates the contract or disables himself from performing it.**

(a) Repudiation - clear and absolute refusal to perform, which includes conduct showing the party is unwilling, even though he may be able, to perform.

THE END OF A CONTRACT
Termination - Breach

(b) Disablement - for example, where a party disposes elsewhere of the specific thing which forms the subject matter of the contract.

- Where one party commits an anticipatory breach, the other can elect to: (i) keep the contract alive by continuing to press for performance (in which case the anticipatory breach will have the same effect as an actual breach); or (ii) "accept" the breach (in which case he has a right to damages and termination.)

THE END OF A CONTRACT
Termination - Breach

- **If the injured party does not accept the breach, he remains liable to perform and retains the right to enforce the other party's primary obligations. However, it must be borne in mind that the effect of one party's breach may mean that it prevents the other party from performing his continuing obligations. Affirmation does not prevent the injured party from terminating the contract on account of a later actual breach.**

THE END OF A CONTRACT
Termination - Breach

- **If the injured party does accept the breach, acceptance must be complete and unequivocal and he should make it plain that he is treating the contract as at an end. A breach can be accepted by bringing an action for damages, or by giving notice of intention to accept it to the party in breach.**

THE END OF A CONTRACT
Termination - Breach

- **Acceptance of the breach entitles the injured party to claim damages at once (before the time fixed for performance). As with an actual breach, an anticipatory breach can also give rise to a right to terminate. This right arises immediately, if the prospective effects of the anticipatory breach are such as to satisfy the requirement of substantial failure in performance.**

Hochster v De la Tour (1853) 2 E & B 678

- **The claimant agreed to be a courier for the defendant for 3 months starting on 1st June 1852. On the 11th May the defendant wrote to the claimant stating he no longer wanted his services and refused to pay compensation. The claimant obtained a service contract elsewhere but this was not to start until 4th July. The claimant brought an action on 22nd May for breach of contract.**

Hochster v De la Tour (1853) 2 E & B 678

- **The defendant argued that there was no breach of contract on 22nd May as the contract was not due to start until 1st of June. The court held: Where one party communicates their intention not to perform the contract, the innocent party need not wait until the breach has occurred before bringing their claim. They may sue immediately or they can choose to continue with the contract and wait for the breach to occur.**

Termination for Breach

- Termination is the remedy by which one party (the injured party) is released from his obligation to perform because of the other party's defective or non-performance. A breach gives the injured party the option to terminate the contract or to affirm it and claim further performance.

Termination for Breach

- **Termination depends on the injured party's election because the guilty party should not be allowed to rely on his own breach of duty to the other party in order to get out of the contract. The injured party must unequivocally indicate his intention to terminate such as by giving notice to this effect to the party in breach or by commencing proceedings.**

Termination for Breach

- The terminating party must terminate the contract as a whole. And, if the injured party accepts further performance after breach, he may be held to have affirmed, and he cannot later terminate the contract. After termination, the injured party is no longer bound to accept or pay for further performance.

Termination for Breach

- However, termination does not release the injured party from his duty to perform obligations which accrued before termination. If the injured party fails to exercise his option to terminate, or positively affirms the contract, the contract remains in force and each party is bound to perform his obligations when that performance falls due.

Termination for Breach

- **At law, the right to terminate for breach arises in three situations: (a) repudiation - where a party evinces a clear and absolute refusal to perform; (b) impossibility - where a party disables himself from performing; (c) substantial failure to perform. Any defect in performance must attain a certain minimum degree of seriousness to entitle the injured party to terminate.**

Termination for Breach

- **A failure in performance is *"substantial"* when it deprives the party of what he bargained for or when it *"goes to the root"* of the contract.**
- **For less serious breaches, a right to damages may arise, but not a right to terminate.**

Termination for Breach

- It should be noted that bringing proceedings for breach of contract does not necessarily amount to termination of that contract. It may be that the claimant is seeking damages alone and/or the contract may contain specified formalities to be met before termination can occur.

VITIATION

- **There are situations where the parties have reached agreement but the question arises whether the existence or non-existence of some fact, or the occurrence or non-occurrence of some event, has destroyed the basis on which that agreement was reached so that the agreement is discharged or in some other way vitiated.**

Misrepresentation

- **A misrepresentation is a *‘false statement’* of fact made by one party to another, which, whilst not a term of the contract, *‘induces’* the other party to *‘enter’* into the contract. An *‘actionable’* misrepresentation must be a false statement of fact, not of *‘opinion or future intention or law’*. Silence *‘does not’* normally amount to misrepresentation.**

Misrepresentation

- **However, the representor must not *'misleadingly'* tell only *'part'* of the truth. Thus, a statement that does not present the *'whole truth'* may be a misrepresentation.**
- **Where a statement was true when it was made but due to a change of circumstances becomes false, there is a *'duty to disclose'* the change.**

With v O'Flanagan [1936] Ch 575 Court of Appeal

- **The claimant purchased a medical practice from the defendant. The claimant was induced to buy the practice by the defendant's statement that the practice took £2,000 per annum. This statement was true at the time it was made. However, subsequently the defendant became ill and many patients went elsewhere.**

With v O'Flanagan [1936] Ch 575 Court of Appeal

- **By time the sale was completed the practice was virtually worthless. The court held: Where a statement is rendered false by a change in circumstances there is a duty to disclose the change. A failure to do so will result in an actionable misrepresentation.**

Misrepresentation

- **A misrepresentation may be:**

(i) Fraudulent - made knowingly, without belief in its truth or recklessly; (ii) Negligent - made by a person who had no reasonable grounds to believe that it was true; or (iii) Innocent - made in the wholly innocent belief that it was true.

Misrepresentation

- **The misrepresentation must have induced, at least partly, the party to enter into the contract and must have been relied on to at least some degree by the person to whom it was made. If that person in fact relies on his own judgments or investigations, or simply ignores the misrepresentation, then it cannot give rise to an action against the person who made the misrepresentation.**

Misrepresentation

- **There are multiple remedies available once misrepresentation has been proved:**

(i) **Rescission - This sets aside the contract and primarily aims to put the parties back in their original position as if the contract had never been made. Rescission can be sought for all cases of misrepresentation.**

Misrepresentation

- However, this is a discretionary remedy - meaning that the courts will not always allow a party to rescind - and the injured party may lose the right to rescind if: a) he has already affirmed the contract; b) he does not act to rescind in a reasonable time; c) it is or becomes impossible to return the parties back to their original position; or d) a third party has acquired legal rights as a result of the original contract.

Misrepresentation

(ii) Indemnity - The court may order payment for expenses necessarily incurred in complying with the terms of the contract.

(iii) Damages - This remedy varies according to the type of misrepresentation. In fraudulent misrepresentation cases there is an automatic right to damages, in negligent cases the injured party may claim damages under common law or under the Misrepresentation Act 1967 s 2(1). In situations of innocent misrepresentation, the court has discretion whether to award damages and may opt to award damages in lieu of rescission.

Mistake

- **A contract may be void or voidable if mistake has occurred. If a contract is void, then it is so *'ab initio'* (from the beginning), as if the contract was never made. In such cases, no obligations will arise under it. Alternatively, if the contract is voidable, the contract will have been valid from the start and obligations may arise under it despite the mistake.**

Mistake

Mistake can be classified into different forms:

- **(i) Common Mistake - A common mistake is one where both parties make the same error relating to a fundamental fact. For example, a contract will be void at common law if the subject of the contract no longer exists - e.g. a contract for the sale of specific goods where those goods have already perished. Similarly, the contract will be void if the buyer makes a contract to buy something that in fact already belongs to him.**

Mistake

(ii) Unilateral Mistake -This occurs when only one party is mistaken. This includes mistake as to the terms of the contract or mistake as to the identity of the parties. A mistake as to terms will make a contract void.

(iii) Mutual Mistake - A mutual mistake is one where both parties fail to understand each other.

(iv) A mistake as to the quality of what is being contracted for - only in extreme cases of such a mistake will the contract be void. It must be a mistake "which makes the thing without the quality essentially different from the thing as it was believed to be".

FRUSTRATION

- **Under the doctrine of frustration, a contract may be discharged if, after its formation, an unforeseen event occurs which makes performance of the contract impossible, illegal or essentially different from what was contemplated.**

FRUSTRATION

- **A good example is *Avery v Bowden*, in which a ship was supposed to pick up some cargo at Odessa. With the outbreak of the Crimean War, the government made it illegal to load cargo at an enemy port, so the ship could not perform its contract without breaking the law. The contract was therefore frustrated.**

Avery v Bowden (1856) 5 E & B 714

- **By contract the claimant was to carry cargo for the defendant. The claimant arrived early to collect the cargo and the defendant told them to sale on as they did not have any cargo for them to carry and would not have by the agreed date. The claimant decided to wait around in the hope that the defendant would be able to supply some cargo.**

Avery v Bowden (1856) 5 E & B 714

- **However, before the date the cargo was supposed to be shipped the Crimean war broke out which meant the contract became frustrated. The claimant therefore lost their right to sue for breach. Had they brought their action immediately they would have had a valid claim.**

FRUSTRATION

- **Frustration will not occur where the frustrating event was caused by the fault of one party. Equally, frustration will not occur where the parties made express provision for the event in their contract (such as in a force majeure clause). The doctrine cannot be invoked lightly, and cannot allow a party to escape from a bad bargain.**

FRUSTRATION

- The position at common law is that frustration discharges the parties only from duties of future performance. Rights accrued before the frustrating event therefore remain enforceable but those which have not yet accrued do not arise. This may cause hardship, as exemplified in *Chandler v Webster*. Here money for hire of a room for the King's coronation was due in advance.

FRUSTRATION

- **Not all the monies had been paid when the coronation was postponed, but the hirer was still liable to pay the full amount. The payment had fallen due before the frustrating event.**

Chandler v Webster [1904] 1 KB 493

- **An English contract law case, concerning frustration. It is one of the many coronation cases, which appeared in the courts after King Edward VII fell ill and his coronation was postponed.**

Chandler v Webster [1904] 1 KB 493

- **Mr Webster agreed to let Mr Chandler a room on Pall Mall to watch the King's coronation on June 26 1902 for £141 15s. It was understood between the parties that the money for the room should be paid before the procession. Mr Chandler had in fact hired the room not for himself, but for a customer. Ultimately the customer did not want the room, since a relative had died.**

Chandler v Webster [1904] 1 KB 493

- **On June 10 Mr Chandler wrote to Mr Webster saying, "I beg to confirm my purchase of the first-floor room of the Electric Lighting Board at 7, Pall Mall, to view the procession on Thursday, June 26, for the sum of £141. 15s., which amount is now due."**

Chandler v Webster [1904] 1 KB 493

- **"I shall be obliged if you will take the room on sale, and I authorize you to sell separate seats in the room, for which I will erect a stand. If the seats thus sold in the ordinary way of business do not realize the above amount by June 26, I agree to pay you the balance to make up such amount of £141. 15s."**

Chandler v Webster [1904] 1 KB 493

- **Mr Chandler paid £100 on June 19, but then the King fell ill. The question was whether the £100 could be recovered by Mr Chandler, or whether Mr Webster could demand the balance.**

Chandler v Webster [1904] 1 KB 493

- **The High Court Wright J held: That the plaintiff was not entitled to recover the £100. which he had paid, and that, on the construction of the letter of June 10, it appeared that the balance was not payable until after the procession, and consequently the defendant was not entitled to recover on the counter-claim.**

Chandler v Webster [1904] 1 KB 493

- **The Court of Appeal Lord Collins MR, Romer LJ and Mathew LJ held: That Mr Chandler was not entitled to recover his damages before the procession became impossible.**

FRUSTRATION

- The Law Reform (Frustrated Contracts) Act 1943 was enacted to remedy this defect. Under the Act, sums paid before that date are recoverable; sums due after that date cease to be payable. Where there has been partial performance, the performing party may be able to recover its expenses incurred in carrying out, or preparing to carry out, that performance.

DAMAGES / REMEDIES

- Damages are intended to compensate the injured party for the loss that he has suffered as a result of the breach of contract. In order to establish an entitlement to substantial damages for breach of contract, the injured party must show that:

(i) actual loss has been caused by the breach;

(ii) the type of loss is recognised as giving an entitlement to compensation; and

(iii) the loss is not too remote.

DAMAGES / REMEDIES

- A breach of contract can be established even if there is no actual loss but in that case, there will be an entitlement to only nominal damages.
- The underlying principle is to put the injured party financially, as near as possible, into the position he would have been in had the promise been fulfilled. As a general rule, damages are based in loss to the claimant not gain to the defendant. In other words, damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party.

DAMAGES / REMEDIES

- **Damages may sometimes be an inadequate remedy. There are a number of equitable remedies, which are discretionary, directed at ensuring that the injured party is not unjustly treated by being confined to the common law remedy of damages.**

DAMAGES / REMEDIES

Specific Performance:

- Where damages are deemed inadequate, the court may make an order for specific performance which will compel the party in breach to fulfil the terms of a contract. The court "will only grant specific performance if, under all the circumstances, it is just and equitable to do so." Specific performance may be refused if the claimant has acted unjustly or unfairly on the basis that the claimant must come to equity with "clean hands".

DAMAGES / REMEDIES

Injunction:

- A court may restrain a party from committing a breach of contract by injunction. Such injunctions may be "interlocutory" ones which are designed to regulate the position of the parties pending a full hearing of a dispute or permanet injunction.

DAMAGES / REMEDIES

- **Further, an injunction (whether interlocutory or permanent) may be *"prohibitory"* ordering a defendant not to do something in breach of contract or *"mandatory"* requiring a defendant to reverse the effects of an existing breach. An injunction will not normally be granted if the effect is to directly or indirectly compel the defendant to do acts for which the plaintiff could not have obtained an order for specific performance.**

Stickney v Keeble [1915] AC 386

- **The purchaser had made repeated complaints about the seller's delay in completing construction. The court held: The repeated complaints formed a principal ground for justification of the short specified notice period.**

Stickney v Keeble [1915] AC 386

- **‘The time limited by such a notice is sometimes referred to as having become, by virtue of the notice, of the essence of the contract. In considering whether the time so limited is a reasonable time the Court will consider all the circumstances of the case. No doubt what remains to be done at the date of the notice is of importance, but it is by no means the only relevant fact.’ Lord Parker.**